No. 280.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,

vs.

ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

Brief of Plaintiff in Error.

E. W. McGRAW,
Attorney for Plaintiff in Error.

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Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendant in error brought suit in ejectment for a mining ditch in Trinity County, California, and for the water rights appurtenant not only to said Boston ditch but to another ditch known as the Altoona ditch, alleging title and ouster, and for five thousand dollars damages.

The complaint alleges that the value of said Boston ditch and of said waters and water rights is more than two thousand dollars.

The ~~amended~~ answer denied all ownership of the plaintiff below in the Boston ditch or water rights in

question, denied any damage, claimed title to the ditch and water rights, denied ouster, pleaded the statute of limitations; alleged abandonment, of the Boston ditch in 1873, a valid location thereof, thereupon by predecessors of defendant in said action (plaintiff in error here).

Trial was had before a jury, numerous exceptions were taken to the rulings of the Court as to the admission of evidence and to the instructions given to the jury by the Court, which exceptions will be considered in detail in their proper place.

The questions involved in the case are:

1st. What acts are necessary to procure and hold title to mining ditches constructed on public lands of the United States.

2nd. What evidence was pertinent and admissible to establish the issues in this case.

3rd. Is the action of ejectment maintainable for a water ditch or water rights.

ASSIGNMENTS OF ERROR.

The plaintiff in error, in accordance with the rules of the Court, makes the following assignments of error.

I.

The plaintiff offered in evidence the Notice of Location of the Trinity Mining Claim by John A. Lytle, A. W. Hawkett and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, California, August 15th, 1872; to the introduction of which Notice in evidence defendant objected on the ground that the same was irrelevant, incompetent and immaterial. Objection was overruled by the Court, (Transcript, p. 24) to which ruling of the

Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

II.

Plaintiff offered in evidence a deed dated August 1st, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of Trinity County, August 4th, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred. H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date, and recorded in the County Recorder's office in Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A. W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County, October 19, 1874. To each of which conveyances defendant objected on the ground that the same were irrelevant, immaterial and incompetent; which objections were overruled by the Court, (Transcript, p. 25) to which rulings of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

III.

Plaintiff offered in evidence Notice of Location of the Altoona Mine by John A. Lytle, dated September 20th, 1874, and recorded in the office of the Recor-

Trinity County, October 15th, 1874; which was objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court; (Transcript, p. 32) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

IV.

Plaintiff offered in evidence a series of mesne conveyances: A deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity claim as located by Hawkett, Crow and Lytle, acknowledged July 7, 1875, and recorded, July 19, 1875, in the Recorder's office of Trinity County. Also a deed from A. W. Hawkett to Marks Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the County Records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona mine, one-half of the Trinity mine, and one-half of the Crow Creek ditch. Also deed from Lytle, Hawkett and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona claim, the Trinity claim, and the Crow Creek ditch and water rights; to each of which said conveyances defendant, by its counsel, objected on the ground that it was immaterial, irrelevant and incompetent. (Transcript, p. 33.) The [illegible] ions were overruled by the Court; to which rulings

of the Court defendant by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

V.

Plaintiff offered in evidence the deed, dated August 16th, 1877, by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situated in Trinity County, State of California, commencing at the Crow Creek and running thence to the Wiltz ravine, and thence to the mining property of the party of the first part, to wit: the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's ditch, which deed was duly acknowledged August 16, 1877, and recorded in the County Records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground, that it was void, as it appeared that it was made after the grantor had ceased to use the water. (Transcript, pp. 40–41) The objection was overruled and deed admitted in evidence; to which ruling of the Court defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

VI.

Plaintiff identified by witness M. D. Butler a letter received by him shortly after it was written, which letter reads as follows:

"JANUARY 10th, 1889.

"MR. M. D. BUTLER,

"Cinnabar.

"DEAR SIR:—

"The Altoona Quicksilver Mining Company hereby "grants you permission to use the water out of the "ditches belonging to the above mentioned company "this spring and until such a time as the company shall "have use for the same, due notice of which you will re- "ceive from the undersigned. In consideration there- "for, you agree to keep the ditches in good order and "repair without any charge to this company. Please "give me in writing your concurrence thereto.

"Yours truly,

"CHARLES ALLENBERG,

"Secretary Altoona Quicksilver

"Mining Company."

To which counsel for defendant objected on the ground that the same was immaterial, irrelevant and incompetent. Objection was overruled by the Court; (Trans., pp. 41–42) to which ruling of the Court defendant, by its counsel then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

VII.

Plaintiff identified by witness Butler a certain letter written and mailed by him at the date thereof and received by Charles Allenberg shortly after, and offered it in evidence, which letter reads as follows:

"CINNABAR MINING DIST.,

"TRINITY CO., JANY. 29, '89.

"CHAS. ALLENBERG, ESQ.,

"DEAR SIR:—

"I am in receipt of yours of 22nd inst., enclosing per-
"mit to use water out of ditches belonging to Altoona
"Quicksilver Mining Company, and in consideration I
"agree to keep said ditches in good order and repair at
"my own expense, and keep possession of same for
"said Company subject to your order.

"Yours truly,

"M. D. BUTLER."

Counsel for defendant objected on the ground that it was immaterial, irrelevant and incompetent; objection overruled; (Transcript, pp. 42–43) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

VIII.

Witness M. D. Butler testified as follows: That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Company and was their General Manager and Superintendent up there. That the work done on the Loring claim was done with water from the Altoona ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Plaintiff then asked the following question: Do you

know how much ore had been taken out of that mine up to the time that you left?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 44) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered as follows: About 12000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76 1-2 pounds.

IX.

Counsel for plaintiff then asked said witness, M. D. Butler: Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled by the Court; (Transcript, p. 44) to which ruling defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

Witness answered: At one time $115.00 a flask, and from that down to $45.00.

X.

Said witness, M. D. Butler, testified that he had often been in the Altoona mine and tunnel.

Plaintiff asked of said witness the following question: State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 45) to which ruling of the Court defendant, by its counsel,

duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: It does for nearly 600 feet.

XI.

Plaintiff then asked said witness M. D. Butler: How wide is that ore body?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p. 45) to which ruling of the Court defendant duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: It varies from 4 feet to 22 1-2; that was apparent in the bottom of the tunnel. right through there, and all of the work has been done above the level of the tunnel.

XII.

The said witness, M. D. Butler, testified, that he sluiced on the Boston mine in 1886 and 1887 with water from the Boston ditch. That he relocated the Boston mine, September 10th, 1885; and it was after that that he used the water.

Plaintiff then asked the following question: Did you have any controversy with the Superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant and incompetent; objection overruled; (Transcript, p 45) to which ruling of the Court defendant, by its counsel, duly excepted: which said ruling of the Court is hereby assigned as error.

The witness answered: I did—with Louis Girard, who was the representative of the Altoona Quicksilver Mining Co., on the ground, about the use of the ditch and wa[illegible]

XIII.

Plaintiff then asked said witness, M. D. Butler: What did he say to you about it?

To which question defendant objected as immaterial, irrelevant and imcompetent; objection was overruled; (Transcript, pp. 45–46) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered: He came on the ditch and told me I must stop using the water of the ditch, that it was the property of the Altoona Company.

XIV.

Said witness, M. D. Butler, further testified: That the defendant took possession of the Boston mine some time in 1891 or 1892. That the witness turned the water out of the Boston ditch, so that it would go down to the head of the Altoona ditch for the purpose of keeping the water running continuously at the Altoona mine on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona mine. That two days after the witness turned the water out of the Boston ditch the McCaws turned it back into the Boston ditch again. That they continued to use it afterwards that season at the Boston mine.

Question by plaintiff: What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any

officer of the Integral Company with regard to the use of this water if any?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the water, and warned me that if I continued that interference, his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court; (Transcript, pp. 47–48) to which ruling of the Court defendant, by its counsel, duly excepted: and the said ruling of the Court is hereby assigned as error.

XV.

Plaintiff's witness F. H. Loring testified: That in 1881, 1882 and 1883 he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness having first proved the genuineness of the signature of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was President of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence on the ground that the same was irrelevant, immaterial and incompetent. Objection was overruled by the Court; (Transcript, p. 57) to which ruling of the Court defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

Said agreement reads as follows, to-wit.

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"WITNESSETH: That the said party of the second "part agrees that the party of the first part may have "whatever water belonging to said party of the second "part is requisite for the working of the Quicksilver "Mine of said first party, and may use the iron pipe of "said second party for the purpose of conducting said "water to the mine of said first party, and in considera- "tion thereof the said party of the first part agrees to "give and pay to the said party of the second part "one-third of the net proceeds of the mine of said party "of the first part so worked by him. The party of the "second part is to incur no liability or expense whatever "in case there shall be no proceeds from working said "mine, and the party of the first part is not to pay to "the party of the second part any compensation what- "ever for the use of said water and pipe unless and un- "til after all the expenses of working said mine shall "have been paid out of the proceeds thereof. This "agreement is not to continue after the expiration of the "year 1882.

"IN WITNESS WHEREOF, the party of the first part and "of the second part have executed this instrument the "31st day of May, 1882.

"F. H. LORING,
"Davis Cinnabar Mine.
"E. L. GOLDSTEIN,
"President Altoona Q. Mg. Co."

XVI.

Plaintiff also had identified and proved the genuineness of the signatures, and that at the date of the instrument said E. L. Goldstein was President of the Altoona Quicksilver Mining Company, and offered in evidence a certain agreement; and defendant, by its counsel, objected to the introduction in evidence of said agreement on the ground that the same was irrelevant, immaterial and incompetent. The objection was overruled by the Court; (Transcript, pp. 58–59) to which ruling of the Court the defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

The said agreement reads as follows:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"WITNESSETH: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine of "said party, and may use the iron pipe of said second "party for the purpose of conducting said water to the "mine of said first party, and in consideration thereof "the said party of the first part agrees to give and pay "to the said party of the second part one-third of the "net proceeds of the mine of said party of the first part "so worked by him.

"The party of the second part is to incur no liability "or expense whatever in case there shall be no proceeds "from working said mine, and the party of the first part

" is not to pay to the party of the second part any com-
" pensation whatever for the use of said water and pipe,
" unless and until after all the expenses of working said
" mine shall have been paid out of the proceeds thereof.

" This agreement is not to continue after the expira-
" tion of the year 1883.

" In witness whereof, the party of the first, and of the
" second, part have executed this instrument this sixth
" day of March, 1883.

" E. L. GOLDSTEIN,
" President Altoona Quicksilver Mg. Co.
" F. H. LORING.
" Davis Quicksilver Mine."

XVII.

Witness J. F. Cox, on cross-examination, testified:

That while he was Superintendent he put some boxes in the Altoona ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water than ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On re-direct examination of said witness, plaintiff elicited evidence tending to prove: That the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes and to the

condensers for the purpose of condensation. That the boxes were put in the immediate center of the ditch at the extreme lower end of the ditch immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question:

What other uses could be made of that water at the Altoona mines by the Altoona Company?

Question was objected to by counsel for defendant as immaterial, irrelevant and incompetent. Objection overruled by the Court (Trans., pp. 63–64); to which ruling of the Court counsel for defendant then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: It can be put to pumping, hoisting, producing electric power, and so forth.

XVIII.

Counsel for plaintiff then asked of said witness Cox the following question: State whether or not all those purposes are necessary and useful in the working of the mine?

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court (Trans., p. 64); to which ruling of the Court counsel for defendant then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: They are both necessary and useful.

XIX.

Plaintiff's witness J. M. Gleaves testified: That he had measured the capacity of the Boston and Altoona ditches to carry water. That the capacity of the Boston ditch is 618 inches measured under a 4-inch pressure. The Altoona ditch run its full capacity is about 1,000 miner's inches.

Counsel for plaintiff asked the following question: State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston ditch) above the collar of the shaft in the hoisting works of the Altoona mine?

This question was objected to by counsel for defendant as immaterial, irrelevant and incompetent. The objection was overruled by the Court; (Transcript, pp. 70-71) to which ruling of the Court, defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: I took the elevation between the collar of the shaft and the mouth of the Altoona ditch and found about 43 feet difference in the elevation.

XX.

That between the collar of the shaft and the Boston ditch on the point of the little hill above the mine the difference was a fraction less than 162 feet. That the collar of the shaft is the main level of the floor in the hoisting works. That the shaft is used for hoisting ores and for general working purposes of the mine, and for pumping. (Transcript, p. 71.)

All this testimony was given under the objection of

defendant as being incompetent, irrelevant and immaterial, and was admitted by the Court subject to the exception of the counsel for defendant to the ruling of the Court: and the said ruling of the Court is hereby assigned as error

XXI.

Also the following testimony was given under the same objection, ruling and exception: (Transcript, pp. 71–72.)

That there is a cage used for hoisting ore and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the collar of the shaft and the cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked, a good miner would go down and sink the shaft deeper.

And the said ruling of the Court is hereby assigned as error.

XXII.

Louis N. Girard, witness for plaintiff, testified: That in 1886 he had charge of the Altoona mining properties.

Counsel for plaintiff asked the witness the following question:

During the year 1886, did you make any arrangement for the Company with the Butlers in regard to the use of the water of the Boston ditch?

This question was objected to by counsel for defendant as irrelevant, immaterial and incompetent; which objection was overruled by the Court; (Transcript, p. 75) to which ruling of the Court the defendant, by its counsel, then and there duly excepted: and the said ruling of the Court is hereby assigned as error.

The witness answered to this question: I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative.

XXIII.

Plaintiff's witness, CHARLES ALLENBERG, testified: That he was the General Manager of the affairs of the corporation plaintiff since 1887.

Plaintiff asked said witness the following question:

During that time what has been your intention as the General Manager of the corporation with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant as immaterial, irrelevant and incompetent.

The objection was overruled by the Court; (Transcript, p. 86) to which ruling of the Court counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Always intended to hold our rights to those ditches.

XXIV.

Plaintiff then asked said witness the following question:

In the same connection, what has been the intention with regard to the Boston ditch and the water right used with the Boston ditch since the date of the deed from the Boston Company to the Altoona Company in 1877?

To which question counsel for defendant objected on the ground that the same was immaterial, irrelevant and incompetent; which objection was overruled by the Court; (Transcript, pp. 86 87) to which ruling of the Court counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

XXV.

Plaintiff then asked said witness the following question:

And what in the same connection with regard to the Altoona ditch and the right to divert water through it?

Same objection, ruling and exception. (Transcript, p. 87.) And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: The same.

XXVI.

Plaintiff then asked said witness:

What use could be made of the water through the Altoona and Boston ditches for the purposes of that Company other than what it has actually been appropriated to?

Objected to by counsel for defendant on the ground that it was irrelevant, immaterial and incompetent and purely speculative.

Objection overruled by the Court; (Transcript, pp. 87–88) to which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Answer: We could use the water for water power, to run our machinery by water power.

XXVII.

Plaintiff then asked said witness the following question:

What advantages would you have as to power when you could bring the water through the Boston ditch over what you would have in bringing the water through the Altoona ditch?

Same objection, ruling and exception. (Transcript, p. 88.) And the said ruling of the Court is hereby assigned as error.

Answer: The difference in the elevation; could get so much more power through the Boston ditch than through the Altoona ditch; the higher elevation gives more pressure.

XXVIII.

Plaintiff then asked the witness the following question:

What benefits would accrue to the Company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling and exception. (Transcript, pp. 88–89.) And the said ruling of the Court is hereby assigned as error.

Answer: It would save us from using steam power, and consequently save a good deal of wood to make steam for the boilers. It would also save an engineer.

XXIX.

Plaintiff then asked said witness the following question:

How much expense per month would it save the Company during such months as it would furnish power?

Same objection, ruling and exception. (Transcript, p. 89.) And the said ruling of the Court is hereby assigned as error.

Answer: It would save some $600 per month during such time as we had the water power.

The counsel for defendant moved to strike out the answer. Motion denied. To which ruling the counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

XXXI.

Plaintiff then asked said witness the following questions:

Question: Did you see Mr. M. D. Butler in this city during the years 1886 and 1887 from time to time?

Answer: Yes, sir, at my office on Brannan St.

Question: Did you have any conversation with him at those times with regard to the use of the Boston ditch and the water there?

Question objected to by defendant as incompetent, irrelevant and immaterial. Objection overruled. (Transcript, p. 89.) To which ruling of the Court defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Answer: Mr. Butler came to me on several occasions and asked me for the use of the water for sluicing boxes and some for iron pipes; and I always give him permission to use our water for sluice boxes or iron pipes.

He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston ditch. That was the only ditch that would carry the water on that mine so far as I know.

XXXII.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co., for the Altoona Quicksilver Mining claims, dated June 21st, 1895. Which patent was objected to by defendant as immaterial, irrelevant and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled. (Transcript, p. 90.) To which ruling of the Court the defendant by its counsel then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

XXXIII.

Said witness Allenberg further testified:

That the Altoona and Trinity Quicksilver mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Plaintiff then asked the witness the following question:

What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant and incompetent, and referring to matters occurring since the commence-

ment of this cause. Objection overruled. (Transcript, p. 85.) To which ruling of the Court, the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

Witness answered: About $71,000 worth.

XXXIV.

Counsel for plaintiff then asked witness the following question:

To what depth has the mine been worked?

Objected to as immaterial, irrelevant and incompetent. Objection overruled. (Transcript, pp. 95–96.) To which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Two hundred and thirty-one and a half feet.

XXXV.

Plaintiff then asked the said witness Allenberg the following question:

What is and has been the intention of the Company and of yourself as General Manager of the Company with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial and incompetent. Objection overruled. (Transcript, p. 96.) To which ruling of the Court the defendant, by its counsel, then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Since 1880, we contemplated to work the mine as we are doing now, but we were unable to do so until last year, on account

of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, counsel for defendant: I move to strike that answer out. Motion denied by the Court. (Transcript, p. 96.) To which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXVI.

Counsel for plaintiff then asked said witness the following question:

What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity County, California, from the time the Company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court. (Transcript, pp. 96–97.) To which ruling counsel for defendant then and there duly excepted. And the said ruling of the Court is hereby assigned as error.

To which question witness answered: About $257,000.

XXXVII.

The Court erred in charging the jury as follows: (Transcript, pp. 121–123–124.)

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. "To constitute such an abandonment there must be a "concurrence of act and intent, viz: the act of leaving "the premises or property vacant so that it may be ap-

" propriated by the next comer, and intending not to " return."

XXXVIII.

The Court erred in charging the jury as follows: (Transcript, pp. 121–124.)

" The mere intention to abandon if not coupled with " yielding up possession or cessation of user is not suffi- " cient; nor will the non-user alone without an intention " to abandon be held to amount to an abandonment. " Abandonment is therefore a question of fact. Yielding "up possession and non-user are evidences of abandonment, " and under many circumstances sufficient to warrant the " deduction of the ultimate fact of abandonment. But it " may be rebutted by evidence which shows that not- " withstanding such non-user or want of possession the " owner did not intend to abandon it."

XXXIX.

The Court erred in charging the jury as follows: (Transcript, pp. 121–124.)

" Use of the ditch and water by any other person by " permission of the owner is sufficient to maintain the " owner's possession, or right of possession, as though it " were used by the owner."

XL.

Counsel for defendant also excepted to the charge of the Court on the ground that the Court in his charge to the jury omitted one of the elements of abandonment, in this:

" That one of the elements of abandonment is left " entirely out.—that is, no matter how strong the inten- " tion is to use the water, or take the use of the water,

" or continue to use it at another time; still, if at another " time they do not use it or begin to use it, or commence " work looking to the use of it in the near future, that " then is abandonment, no matter how strong their in- " tention in the future is. They must do some active " work applying the water to that use or some other " beneficial use." (Transcript, pp. 124–125.)

And said omission from said charge of the Court is hereby assigned as error.

XLI.

The Court erred in refusing to charge the jury at the request of the defendant, as follows, to-wit (Transcript, p. 125):

" The use required by the Statute to entitle a person " to the waters of a stream must be an actual use for " some beneficial purpose. It is not sufficient under the " law that there be simply a claim to the water without " any use. And if you find from the evidence that the " plaintiff, the Altoona Quicksilver Mining Company, did " not, since the year 1881, use any of the waters that ran " through the Boston ditch, and did not in good faith intend " to use them, but allowed the ditch to go to ruin and " decay, so that the same could not be used as a ditch, " but claimed the Boston ditch and water right for the " sole purpose of preventing others from using said water " for a beneficial purpose, I charge you that such a claim " is not sufficient to entitle the plaintiff to the possession " of said ditch in this action, and you should find for the " defendant upon that branch of the case."

XLII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit (Transcript, p. 126):

"No appropriation of water can be made for purely "speculative purposes, and the right to use water can "only be acquired for the purpose of applying it to a "beneficial purpose, and as soon as the purpose ceases, "the right to use the water ceases at once, unless the "appropriator, within a reasonable time, takes active "steps to apply said water to another beneficial use.

"A person cannot hold the right to use water against "the subsequent appropriator by an intent formed in the "mind to, at a future date, put the water which he has "ceased to use to another and different purpose or use, "unless he begins active work upon the new use within "a reasonable time after he has ceased to use the water "for the original purpose, and prosecuted the same dili-"gently to a conclusion. The law does not permit a "person to hold water for speculative purposes, and no "matter how good the intentions of the appropriator "may be to use water for a beneficial purpose in the "future, still, he is only allowed a reasonable length of "time, consistent with the magnitude of the work neces-"sary, to use the water and his diligent and reasonable "exertions to complete the work."

XLIII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit (Transcript, p. 127):

"By Act of Congress, the Government of the United

" States has given to the appropriators and users of " waters, the right to run their canals and ditches over " the vacant and public lands of the United States. The " right to run canals and ditches does not give the party " building the same any title to the land, except the " right of way across it. The right is merely an ease- " ment and continues only so long as the ditch is used " to convey water for a needful and beneficial purpose, " and whenever the party who built the ditch, or his " successors in interest, ceases to use the same, for an " unreasonable length of time, for the purpose of con- " veying water to be used for a needful purpose, then " the rights of the party who built the ditch, or his suc- " cessors in interest, ends, and any person may enter in- " to and upon said ditch and use the same to convey " water for the purpose of applying it for a beneficial " use, and the party who built the ditch, or his successors " in interest, cannot complain."

XLIV.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to-wit: (Transcript, pp. 127, 128.)

" The test of the right to water in this State is gover- " ned by appropriation, use and non-use. The right of a " party to use water for a beneficial purpose continues as " long as the water is actually applied to that use, or to " some other beneficial use, and terminates when the " use is discontinued. The original use, however, can- " not be changed by the original appropriator or his suc- " cessors in interest to the detriment of a subsequent ap- " propriator, nor can the original appropriator or his

" successors in interest assert, against a subsequent ap-
" propriator, his intent to change the use of the water to
" another purpose which will be injurious to a subsequent
" appropriator, unless the first appropriator has done
" some act and used due diligence within a reasonable
" time towards the making of said change prior to the
" appropriation of said water by another person. If the
" purpose for which the water was originally appropriated
" has failed, the first appropriator cannot hold that water
" indefinitely for any other purpose, unless he takes
" active steps to do so within a reasonable time and
" before others have appropriated the water. The doc-
" trine is that no man shall act upon the principle of the
" dog in the manger either in the appropriation of water,
" for which he has no present use, or in the holding of
" water which he has ceased to use."

XLV.

This is an action of ejectment for a water ditch and water rights. Ejectment will lie for neither a water ditch or water rights, and the action should be dismissed.

ARGUMENT.

A large portion of the exceptions to the evidence and of the exceptions to the instructions of the Court, given and refused, are based upon principles which are at the foundation of titles to ditch property on government lands.

Before entering upon the details of our exceptions, we think it will facilitate a proper understanding of the position and claims of the plaintiff in error to briefly recapitulate the facts as disclosed by the evidence, so far as is necessary, to show the bearings of the instructions and

testimony excepted to, and to discuss at such length as need be the fundamental principles underlying the rights and claims of the parties hereto.

THE FACTS.

The Trinity and Altoona mines are quicksilver mines in the Cinnabar District, Trinity County, California, located in 1872 and 1874, and which came into the possession of defendant in error in 1875. These two mining claims, at the time of the trial of the case, had both been patented to defendant in error. As shown by the patents and maps in evidence, the Altoona and Trinity claims are each located in the west half of Sec. 22, T. 38 N., R. 6 W., in Trinity County. They are adjoining claims, extending east and west, each 600 feet wide from north to south, and 1,500 feet long from east to west. The Trinity is the more northerly of the two. Crow Creek is a stream flowing in a southerly course through Sections 14 and 23 and emptying into the east fork of Trinity River in northwest quarter of Sec. 26. Wiltz Gulch is a a stream flowing in a southeasterly direction through the northwest and southwest quarters of Sec. 14 and emptying into Crow Creek, in the northwest quarter of the southeast quarter of Section 14. Prior to 1875, a ditch had been dug to supply the Trinity and Altoona mines with water from Crow Creek and Wiltz Gulch. The ditch commenced at Crow Creek, a little south of the north line of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 14; thence running in a general southwesterly direction, following the sinuosities of the mountains, it crossed Wiltz Gulch in the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 14 and took

water therefrom; thence extending through the south-west quarter of Sec. 14, across the extreme southeast corner of Section 15 and down through Section 22, upon and across the north half of the Trinity Mine. The defendant in error came into possession of that ditch in 1875, and has held and used it off and on ever since. No question is made as to their title to it. This ditch is known as the Altoona or Crow Creek Ditch.

In the year 1875, M. D. Butler and his associates took possession of some mining gronnd which he called the Boston Mine. It is a claim 600 by 1500 feet; runs from northeast to southwest and lies principally in the south half of south east quarter of Sec. 15, but a small portion of it is in the north half of the ~~south~~ north half of the north-east quarter of Section 22. In 1875, Butler and his associates commenced to build the ditch in controversy known as the Boston Ditch, commencing at the north fork of Crow Creek in northwest quarter of Section 14; thence southwesterly to Wiltz Gulch in same quarter section; thence utilizing Wiltz Gulch as a water way, to a point in northeast quarter of southwest quarter of Section 14, the water was there taken from the Gulch, by a ditch running a little north of west through the north half of the south-west quarter of Section 14, into the southeast quarter of Section 15: thence southwesterly through said quarter section to and upon the Boston Mine.

Butler and his associates conveyed the Boston mine to the Boston Cinnabar Mining Company, (a corporation), in August, 1875, and that corporation completed the ditch which they had begun. In August 16th, 1877, the

Boston Cinnabar Mining Company conveyed the ditch to the defendant in error.

We have not deemed it necessary to refer to the Transcript to support the foregoing allegations of fact as we do not deem it possible that there can be any controversy about them.

As to other facts about to be stated there is some conflict in the evidence and we will cite the Court to the Transcript; but it must be remembered that the only use of the testimony is to illustrate the exceptions, and that no matter how conflicting the evidence may have been on any point, an instruction, not in itself good law, which removed our theory of the facts as disclosed by the evidence from the consideration of the jury, is reversible error. For all purposes of this case the material evidence is that which is most favorable to ~~defendant~~ plaintiff in error.

If our view of the law is correct, however, the conflict in the evidence is not material. It relates chiefly to the use of the Boston Ditch by the defendant in error.

In 1876 or 1877 the Boston Ditch was extended from the Boston mine southwesterly to a point northwest of a reservoir, which reservoir, as shown by the map of plaintiff in error, is a short distance north of the center of Sec. 22. (Witness Horan, Transcript, p. 27; Littlefield, Transcript, p. 35; M. D. Butler, Transcript, p. 40.) A further extension southwesterly is said to have been made in 1879. (Witness Osgood, p. 66.)

One witness who was in the employ of defendant in error from 1875 to 1879, says that in one season and in one only during that time, was water from the Boston Ditch, used by defendant in error, he thinks, in 1878. (Horan, Transcript, pp. 26-28.) Another witness says

the water was used two seasons during that time, but not later than 1878. One season by defendant in error on Altoona Mine and the other season by having a renter, on an outside claim, the Loring claim. (Littlefield, Transcript, pp. 36–37.) Another says they used the water on the Loring claim in 1879, 1880, 1881 and 1883. (Osgood, Transcript, pp. 66–67.) Another that there was no water in the Boston Ditch in 1883 or 1886. (Dack, Transcript, pp. 64–65.) Another, an employee of defendant in error, says: Boston Ditch, after the time he went there in 1879, was never used by defendant in error, and in only one year, 1880, was used at all, and that was on the Loring claim, west of the Trinity and Altoona mines. (Girard, Transcript, pp. 73, 76, 77.) Another that there was no water in the Boston Ditch below the Boston Mine from 1882 to 1892. (M. D. Butler, Transcript, p. 50.) Still another that the ditch was not used by defendant in error in 1878 or 1879 (Carter, Transcript, pp. 101, 102.)

Allenberg, who was from 1875, Manager of the Altoona Quicksilver Mining Co., says that all he ever did in relation to the Boston Ditch since 1878 was simply to claim it and think that at some time he would use it for power; that since 1878 he never tried to get any water through the Boston Ditch down to the Altoona Mine. (Transcript, p. 100.)

So that it is absolutely certain from the testimony that defendant in error never used the ditch in question after 1883, and there is evidence from which the jury, if they had been allowed to pass on the question, might well have concluded that its last use by defendant in error was as early certainly as 1878. This action was com-

menced in December 1893, so that the non-user embraced a period of ten years certainly, with evidence tending to prove that it existed for fifteen years, before the commencement of this action.

The subsequent history of the Boston Ditch is as follows: In 1884, Girard, who was then in charge of the Altoona Mining Co's. property, without any instructions from any one and on his on responsibility cleaned it out. (Transcript, pp. 73, 76.)

In 1883, M. B. Butler relocated the Boston Mine, then long since abandoned, and in 1885, 1886 and 1887, used water from the Boston Ditch upon it. (Transcript, pp. 41, 46, 51, 55) and also in 1888 and up to April, in 1889. (Transcript, p. 54.)

Prior to January, 1889, when Butler was using water out of the Boston Ditch, Girard, Superintendent of the Altoona Co., came up and turned it off, and notified him that it was the property of the Altoona Co., and that Butler could use it only by permit. Butler made some sort of a compromise with Girard by which the Altoona Co., would allow him to use the water. (Transcript, p. 48, 53, 54, 75.) On January 10th, 1889, Butler got a written permit from the Altoona Company to use the water "until such time as the Company shall have use for the same." (Transcript, p. 42.) The permit conclusively shows that defendant in error was not then using the ditch or water and had not then any use for it.

In 1892, McCaw President of the plaintiff in error took possession of the ditch above the Boston Mine, located the water by posting notice, cleaned the ditch down to the Boston Mine, and used the water at the mine. The plaintiff in error took possession of the

Boston Mine in 1891 or 1892. (Transcript, pp. 46, 47.)

In 1888, the Boston Ditch, from the north fork of Crow Creek to Wiltz Ravine was all out of repair. In 1888, no water running through ditch to Boston mine, nor from Boston mine to Altoona mine. (Lytle, Transcript, p. 32.)

From 1882 to 1892 no water flowed through that portion of the Boston Ditch below the Boston mine. (M. B. Butler, Transcript, p. 50.) In 1892 the ditch below the Boston mine was filled with gravel, sand, rocks and trees, and was not in a condition to run water. That portion of the ditch was not in condition to conduct water in any year between 1882 and 1892. In 1882 the ditch above Boston mine could not carry water until cleaned out by witness. (M. B. Butler, Transcript, p. 51.)

Girard, former employee and superintendent of defendant in error, says from 1880 to 1888 no water ran through Boston Ditch below Boston mine, except in 1880, when it was used on the Loring claim, then called the Davis claim. That in 1888 no living man could have put water through the ditch below Boston mine. The ditch was filled up and caved in,—filled with dirt and brush. (Transcript, pp. 73, 77.) In 1888 there were no places where water would run at all. (Transcript, p. 79.)

C. M Butler says from 1887 to 1891 the ditch below Boston mine was filled up with rocks and brush in places. In 1885, ditch in pretty good shape for quite a distance, but no water ran through it. (Transcript, p. 82.)

Carter says in 1892 ditch between Wiltz Gulch and Boston mine out of repair,—not possible to run water through it till it was cleaned out. In 1878 ditch below

Boston mine in pretty fair condition,—no water through it in 1878 or 1879. In 1892 that portion of ditch in bad condition, filled with logs, rocks and brush, and banks caved in. (Transcript, pp. 101, 102.)

Cummings says from 1886 to 1891 no water in Boston Ditch below Boston mine. It would not carry water without being cleaned out. (Transcript, pp 112, 113.)

The ditch was originally wholly on government land, and still is so except where it passes through the Boston Mining claim, which claim has been purchased from the United States by plaintiff in error.

THE LAW OF THE CASE.

The fact being that plaintiff's right of recovery is based on a possession or possible title acquired in 1875, followed by absolute non-user for over ten, and as we claim for over fifteen, years before suit brought, the law pertinent to such facts should have been correctly given to jury. But throughout the trial and in its instructions to the jury, the Court below acted on a mistaken theory as to the law of the case.

The Civil Code of California, which was in force in 1872 and ever since, provides as follows:

Section 1410. "The right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation."

Section 1411. "The appropriation must be for some useful or beneficial purpose, *and when the appropriator or his successor in interest ceases to use it for such a purpose his right ceases.*"

It is singular that up to the trial of this case in the Court below, the construction and application of that

portion of Section 1411, italicised as above, had never been adjudicated by the Supreme Court of California, or by any Court of the United States.

In March, 1895, the Supreme Court of California decided the case of Utt *v.* Frey, 106 Cal., 392, in which, without any reference to or consideration of Section 1411, it said (p. 397):

"The right which is acquired to the use of water by "appropriation may be lost by abandonment. To aban- "don such right is to relinquish possession thereof with- "out any intention to repossess. To constitute such "abandonment there must be concurrence of act and "intent, viz: the act of leaving the premises or property "vacant, so that it may be appropriated by the next "comer, and the intention of not returning. [Citing cases.] "The mere intention to abandon, if not coupled with "yielding up possession or a cessation of user is not "sufficient, *nor will the non-user alone without an inten- "tion to abandon* be held to amount to an abandonment, "etc."

In that case it does not appear that the sections of the Civil Code above cited were called to the attention of the Court: nor were they material to that case. In that case there was no question of cessation of user, as it affirmatively appears that the ditch was in constant use, (p. 398) and we think the italicized language used was merely obiter. However, the Court below, and as it seemed to us, reluctantly, deemed itself bound by that decision; and the rulings of the Court as to admission of testimony and in its instructions and refusal of instructions were based on the law as stated in that decision. Fortunately we are relieved of the necessity to discuss that

opinion, as the same Court has, since the trial of this case in the Court below, construed Section 1411.

We refer to a case which is the first and only case construing that section and which conclusively demonstrates the error of the theory on which this case was tried in the Court below, and the erroneous application which was made of the doctrine of Utt *v.* Frey.

The principle of the decision of this later case must commend itself to Courts of the United States, because it is in harmony with the legislation of the United States.

The doctrine of abandonment set out in Utt *v.* Frey, would incumber the lands of the United States and of purchasers from the United States, for all time to come, with easements held and used only for purposes of speculation, annoyance or blackmail. This doctrine of abandonment, dependent upon intention, was formerly applied to mining claims located on government lands, but Congress utterly abolished it by the Act of May 10th, 1872, now incorporated in Section 2324 of Revised Statutes, which provides that if annual work on a mining claim is not performed in any one year, the claim shall be subject to relocation by third parties. As the old doctrine of abandonment has now no application to mining claims on government lands, it would seem to follow that it can have no application to a mere appurtenant of the claim, such as a mining ditch. It would be a curious result that if A, who takes up a mining claim on U. S. lands, and also takes up water from a U. S. stream and builds a ditch over U. S. land for the sole purpose of working the claim, afterwards suffers the mining claim to be legally relocated, that he can for all time to come, by his mere

intention not to abandon the ditch and water right, prevent the relocator from working his claim.

The case to which we refer, to-wit: Smith *v.* Hawkins, 42 Pac. Rep., 453 (not yet officially reported), does away with the possibility of such injustice.

The material portion of the decision is as follows:

"PER CURIAM: Action begun in October, 1892, to "quiet the alleged title of plaintiffs to a dam, ditch and "water right for the diversion of the waters of Wolf "Creek in Nevada County. As early as the year 1862, "one John Ross was in possession of the ditch, and sold "water from the same. The ditch claimed by plaintiffs "is two-thirds of a mile in length. Its original capacity "was 457 inches of water, though it seems to be now so "filled up as to be capable of carrying about 100 inches "only. Plaintiffs claim in virtue of a deed to them ex-"ecuted by Ross in March, 1888, which, for the purposes "of the decision, we shall assume was sufficient to con-"vey his title to the property in dispute. Since the "year 1875 taxes have been annually assessed against "such property, and paid by Ross and his successors, "the plaintiffs. In 1890 it was leased by plaintiffs to "persons who made no use of it, but who paid two "months' rental therefor, at $15 per month. Defendant "owns a piece of land lying below the head of the Ross "Ditch and riparian to said creek. One-fourth of a mile "of the length of such ditch is on defendant's said land, "and was there constructed before defendant settled on "the same. He having acquired title to the land under "the federal homestead laws, the patent therefor was is-"sued to him in 1891. In 1879 the defendant con-"structed a ditch tapping the creek about 50 feet below

" the Ross dam, and having a capacity of 200 inches of " water under 6-inch pressure; and by that means, for 13 " years next before the commencement of this action, " continuously, uninterruptedly, with a claim of right, " peaceably, and with the knowledge of plaintiffs and " said Ross, defendant diverted such water to the extent " of the capacity of his ditch, and used the same for " agricultural purposes on his said land. For the period " of 5 years and more next before the commencement of " the action, the dam, ditch, and water right claimed by " plaintiffs have not been used by Ross, or any one who " has succeeded to his interest, for any useful or bene- " ficial purpose. Neither he nor they have ever owned " any property below the head of that ditch to which " the water could be applied. For any purpose of pro- " fit, its use was contingent on its sale or rental to " other persons, and this occurred very infrequently.

* * * * * * * * * *

" Plaintiff's predecessor in interest appropriated water " by means of his ditch, and conveyed it over and across " the land of the defendant, which, at the time of appro- " priation, was a part of the public domain. While the " rights of rival claimants and appropriators, as between " themselves, had for a long time been recognized and " adjusted, both by mining custom and adjudications in " the State Courts, it was not until 1866 that they met " with federal cognizance and sanction. In that year the " United States conferred upon those who had or who " might thereafter appropriate water, and conduct the " same over the public land, a license so to do; and fur- " ther provided that all patents granted, or pre-emptions " or homesteads allowed, should be subject to any such

" vested and accrued water rights, or rights to ditches " and reservoirs used in connection with such water " rights, as might have been acquired under or recognized " by the act. Rev. St. U. S., §§ 2339, 2340. An ap- " propriator of water under these circumstances, and " while the land which he subjects to his necessary uses " continues to be part of the public domain is a licensee " of the general government; but, when such part of the " public domain passes into private ownership, it is bur- " dened by the easement granted by the United States " to the appropriator, who holds his rights against this " land under an express grant. In this essential respect, " —that is to say, in the origin of the title under which " the servient tenement is subjected to the use,—one " holding water rights by such appropriation differs from " one who holds water rights by prescription. The " differences are two-fold: A prescriptive right could not " be acquired against the United States, and can be ac- " quired only by one claimant against another private in- " dividual. Again, such an appropriation, to perfect the " rights of the appropriator, does not necessitate use for " any given length of time; while time and adverse use " are essential elements to the perfection of a prescriptive " right. One who claims a right by prescription must " use the water continuously, uninterruptedly, and ad- " versely for a period of at least five years, after which " time the law will conclusively presume an antecedent " grant to him of his asserted right.

" Section 811 of the Civil Code, discussing the ex- " tinguishment of servitudes, declares (subdivision 4): " ' When the servitude is acquired by enjoyment, disuse " thereof by the owner of the servitude for the period

" prescribed for acquiring title by enjoyment extinguishes " the servitude.' That this section cannot in strictness " be applied to rights under such an appropriation as we " have been discussing becomes obvious when, as above " pointed out, it is considered that there is no period " prescribed for acquiring title to such rights. Section " 811, therefore, deals with the extinguishment of servi- " tudes resting upon prescriptive right,—a right vesting " by reason of continued adverse enjoyment. Section " 1411 of the Civil Code declares that the appropriation " must be for some useful or beneficial purpose, and, " when the appropriator or his successor in interest " ceases to use it for such a purpose, the right ceases. " This section deals with the forfeiture of a right by " non-user alone. We say non-user, as distinguished " from abandonment. If an appropriator has, in fact, " abandoned his right it would matter not for how long a " time he had ceased to use the water; for, the moment " that the abandonment itself was complete, his rights " would cease and determine. Upon the other hand, he " may have leased his property, and paid taxes thereon, " thus negativing the idea of abandonment, as in this " case, and yet may have failed for many years to make " any beneficial use of the water he has appropriated. " The question presented, therefore, is not one of ab- " andonment, but one of non-user merely, and, as such, " involves a construction of Section 1411, Civil Code. " That section, as has been said, makes a cessation of " use by the appropriator work a forfeiture of his right, " and the question for determination is, how long must " this non-user continue before the right lapses? Upon " this point the legislature has made no specific declara-

" tion, but, by analogy, we hold that a continuous non-
" user for five years will forfeit the right. The right to
" use the water ceasing at that time, the rights of way
" for ditches and the like, which are incidental to the pri-
" mary right of use, would fall also, and the servient
" tenement would be thus relieved from the servitude.

" In this State five years is the period fixed by law for
" the ripening of an adverse possession into a pres-
" criptive title. Five years is also the period declared
" by law after which a prescriptive right depending upon
" enjoyment is lost for non-user; and, for analogous rea-
" sons, we consider it to be a just and proper measure of
" time for the forfeiture of an appropriator's rights for a
" failure to use the water for a beneficial purpose. Con-
" sidering the necessity of water in the industrial affairs
" of this State, it would be a most mischievous perpetuity
" which would allow one who has made an appropria-
" tion of a stream to retain indefinitely, as against other
" appropriators, a right to the water therein, while failing
" to apply the same to some useful or beneficial purpose.
" Though, during the suspension of his use, other persons
" might temporarily utilize the water unapplied by him,
" yet no one could afford to make disposition for the em-
" ployment of the same, involving labor or expense of
" any considerable moment, when liable to be deprived
" of the element at the pleasure of the appropriator, and
" after the lapse of any period of time, however great.
" The failure of plaintiffs to make any beneficial use of
" the water for a period of more than five years next pre-
" ceding the commencement of the action, as found by
" the Court, results, from what has been said, in a forfeit-

" ure of their rights as appropriators. The judgment and " order are reversed."

The foregoing decision exactly fits this case. The cases are parallel. The defendant in this case, plaintiff in error here, like the defendant in that, had, since the ditch was constructed purchased from the United States a portion of the land, to-wit: the Boston mine, over which the ditch in controversy was laid out. (See Receiver's Certificate of Purchase. (Transcript, p. 107.)

In this case as in that the plaintiff for a long series of years had made no use of the ditch, and sought to maintain its right by infrequent rental to other persons.

That the instructions given in the Court below, and the refusals to instruct were error, appears to be incontestable. They all antagonize the doctrine of Smith *v* Hawkins.

The instructions excepted to in our assignments of error, XXXVII and XXXVIII. are almost an exact reproduction of the decision of the Supreme Court of California, in

Utt *v.* Frey, 106 Cal., 397, 398.

The *obiter* of that decision: "nor will the non-user alone without an intention to abandon, be held to amount to an abandonment," is reproduced in its exact language in the instruction excepted to in our assignment XXXVIII.

But the later decision of the same Court in Smith *v.* Hawkins, holds that under the Statutes of California, right to a ditch is forfeited by non-user alone, in the absence of any intent to abandon. It is true the Court does not class non-user as a species of abandonment, but the classification is merely technical. When a jury is

instructed as it was in this case that a right once acquired can be lost only by abandonment, and that non-user alone was not abandonment, it must be manifest that the Court meant the jury to understand, and that the jury did understand, that the fact of non-user, no matter how long continued or ~~more~~ here definitely proved, had no effect on the rights of the plaintiff below.

The attention of the Court was specifically called to this matter by our assignment Number XL *ante*.

The instruction excepted to in our assignment XXXIV is clearly irreconcilable with Smith *v.* Hawkins,—the instruction being as follows:

"Use of the ditch and water by any other person, by permission of the owner, is sufficient to maintain the owner's possession, or right of possession, as though it were used by the owner."

The instruction asked by us and refused, embodied in our assignment of error XLI, is strictly in accordance with the doctrine of Smith *v.* Hawkins, and we have already shown that, under the testimony in this case, it was applicable and pertinent to the issues.

The same comments apply to the instruction asked by us and refused, embodied in our assignment XLII, and also to the instructions asked and refused and embodied in our assignments XLIII and XLIV.

ERRONEOUS RULINGS AS TO EVIDENCE.

Assignments I, II, III, IV, are all founded on the introduction of the paper title to the Altoona and Trinity mines. The title to those mines was not in issue, and could in no way throw any light upon the title to the Boston Ditch in controversy here, as the plaintiff below

did not claim to have acquired any title to the Boston Ditch until long after the date of the latest deed admitted in evidence over our objection. It is difficult to surmise any theory upon which the admission of those documents can be justified.

Assignments VI and VII relate to a proposition from the plaintiff below to M. D. Butler, in 1889, to use the water "out of the ditches belonging" to said plaintiff, and acceptance of the proposition by Butler. These documents were clearly irrelevant and immaterial under the doctrine of Smith *v.* Hawkins.

There is no pretence of any use of the Boston Ditch by plaintiff below for a good deal more than five years prior to the dates of those documents. If it ever had any right thereto, it had long before been forfeited by non-user, and these documents could not revive the right. Under any aspect of the case, they were immaterial and inadmissible.

Assignments VIII, IX, X, XI, relate to the admission in evidence of the opinion of Mr. Butler as to the indications upon, and the product of, the Altoona and Trinity mines. The testimony had as little to with the issues involved in this case, as to a question involved in the next transit of Venus. Upon what theory the testimony was admitted is not apparent. It may have afforded place for the counsel for plaintiff to argue to the jury with sonorous eloquence, that to him who hath should be given, and that a company which had prodigiously rich mines should be awarded all the surrounding country.

Assignments XII and XIII relate to the admission in evidence of a controvery between the witness Butler and the superintendent or manager of defendant in error at

some time after 1886. The evidence was clearly inadmissible under doctrine of Smith *v.* Hawkins.

Assignment XIV relates to the admission in evidence of a controversy between Butler, as manager of defendant in error, and McCaw, president of plaintiff in error. It seems that after plaintiff in error had taken possession of the ditch in controversy and was putting it to a beneficial use, Butler turned the water out of it, and McCaw told him if he repeated the offence he would have him strung up. On no possible theory could that testimony be relevant. It could have no effect upon the rights of the respective parties, and could have been introduced for no other purpose than to afford counsel an opportunity to prejudice the jury by denouncing the agents and employees of plaintiff in error as lawless desperadoes, etc. It is not necessary to rehearse that class of oratory. It is familiar to all.

Assignments XV and XVI relate to the introduction in evidence of two agreements between the defendant in error and one F. H. Loring, one in 1882 and the other in 1883, by which Loring was given the use of the "water belonging to" said defendant in error for use in the "Loring" claim—a claim which adjoined and was west of the Altoona and Trinity claims.

The evidence was clearly incompetent under doctrine of Smith *v.* Hawkins.

Assignments XVII and XVIII relate to testimony of J. D. Cox. He had testified as to uses to which the water of the Altoona ditch had been put by defendant in error since the commencement of this action. He was then asked what other uses that water could be put to, and

having answered, was asked if such uses were necessary and useful.

The questions related only to the Altoona ditch, as to which there is no controversy. But if they had related to the Boston ditch, it must be apparent that possibilities of use in 1894 and 1895 could throw no light on the title of the parties in 1892 and 1893.

Assignments XIX, XX, XXI relate to the same class of testimony as enumerated in the last assignment—to wit, the possibilities of uses of the Boston ditch by defendant in error in 1894-5.

Assignment XXII relates to the admission in evidence of the testimony of Girard that in 1886 he, as superintendent of defendant in error, gave Butler permission to use the Boston ditch. It was clearly irrelevant under Smith *v.* Hawkins.

Assignment XXIII. Allenberg, manager of defendant in error from early days, was asked "What has been *your* intention as general manager of the corporation with regard to holding the corporation's rights to those ditches and water rights?"

The question was immaterial and irrelevant on two grounds.

1st. If intention to use the ditch in question could be material, it would be the intention of the corporation and not that of its manager. The intention of a servant of a corporation, not accompanied by acts, can under no circumstances be held to be the intention of the master: though the authorized acts of the servant may throw light on the intention of the master.

2nd. The intention, expressed or unexpressed, even

of the corporation, was immaterial under the doctrine of Smith v. Hawkins.

Assignments XXIV and XXV were exceptions to questions of the same character as the last.

We add to our remarks under last assignment that if it was the intention of the *corporation* that was sought to be elicited, the testimony of the witness was incompetent. As corporations have no souls, so they have no minds. There cannot be such a thing as an "intention" of a corporation, not expressed by some corporate act.

Assignments XXVI, XXVII, XXIX, XXX, concern questions asked Allenberg as to possible uses by defendant inerror of the Boston Ditch, and soliciting guesses from the witness as to the possible mining value of the Boston Ditch to defendant.

The witness was profoundly ignorant as to all those subjects and his answers were mere guesses and conjectures He had never had a survey made of the Boston Ditch until after this suit was commenced; never had any measurements taken as to fall of the water in that ditch until after suit commenced; never had any estimate made of the amount of water that could be gotten through the ditch at different seasons of the year; he did not know whether a small or large amount of water could be got through; he never made any efforts to ascertain whether there could be sufficient water to run machinery. (Transcript, p. 99.)

But aside from all this, possible or even intended uses of water, had no tendency to disprove non-user for ten years or more before the action was commenced and evidence thereof was immaterial and irrelevant under the doctrine of Smith v. Hawkins.

Assignment XXXI concerns testimony of Allenberg as to applications of Butler for permission to use water of Boston Ditch in 1886–7. It is the same class of testimony as that excepted to and set forth in previous assignments.

Assignment XXXII was as to introduction in evidence of patents of U. S. for the Altoona and Trinity mines, dated June 21st, 1895, long after this action was commenced. If the title to these mines was material, the plaintiff in an ejectment suit could not prove title acquired after commencement of the action.

Assignments XXXIII, XXXIV, XXXV, XXXVI relate to evidence elicited from witness Allenberg as to the products of the mines of defendant in error, the amount expended in their development, and the intentions of the witness as to the future management. All the questions and answers were utterly irrelevant to the question of title to the Boston Ditch, but served to impress on the minds of the jury that the plaintiff below was a rich and powerful corporation.

THE JUDGMENT ROLL.

On the complaint this action cannot be maintained and the judgment should be reversed with direcitons to dismiss the action.

This is an action of ejectment for the Boston ditch and for water rights.

The right to the use of water is an incorporeal hereditament for which ejectment will not lie.

" Oil is a fluid like water: it is not the subject of property except while in actual occupancy. A grant of water

has long been considered not to be a grant of anything for which an ejectment will lie."

Dark *v.* Johnston, 93 Am. Dec., 732.

S. C., 55 Pa. St., 164.

Ejectment will not lie for a fishery or diversion of a water course.

Black *v.* Hepburn, 2 Yeates Pa., 333.

The appropriator of water has no title therein except perhaps as to the limited quantity, which may be flowing in his ditch.

Wheeler *v.* Irrigation Co., 3 Am. St., 605.

S. C., 10 Colorado, 582.

Kidd *v.* Laird, 15 Calif., 179, 180.

The adjustment of conflicting rights to water is a proper subject only for a Court of Equity.

City of Salem *v.* Salem F. M. Co., 12 Oregon, 387.

Olmstead *v.* Loomis, 9 N. Y., 423.

A ditch is nothing more than an excavation in the ground. It is a watercourse. A watercourse is defined to be a channel or canal for the conveyance of water. It may be natural, as when it is made by the natural flow of water caused by the general superficies of the surrounding land, from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands from which it will not flow in consequence of the natural formation of the surface of the surrounding land.

Earl *v.* DeHart, 72 Am. Dec., 398.

S. C., 1 Beasley's Ch., (N.J.,) 280.

Hawley v. Shelton, 33 Am. St., 942.

S. C., 64 Vt., 491.

Chamberlain v. Hemmingway, 33 Am. St., 332.

S. C., 63 Conn., 1.

It is well settled that ejectment will not lie for a water course.

Swift v. Goodrich, 70 Cal., 106–7.

Black's Pomeroy on Water Rights, Sec. 75.

Newell on Ejectment. p. 54.

In Tibbets v. Blakewell, 35 Pac. Rep., 1007, not officially reported, ejectment was brought for a strip of land six feet in width. The land was the property of the plaintiff. Defendant denied the ouster. It appeared from the evidence that a water ditch was located on the strip of land. The only evidence of ouster was evidence that defendant had diverted and appropriated the water of the ditch. The Supreme Court of California held that this was no ouster, but a mere trespess for which an action for damage would lie.

The basis of an action of ejectment is an ouster. If there can be no ouster there can be no ejectment and if appropriation and diversion of ~~ouster~~ water from a ditch is not ouster, it is difficult to conceive what act would constitute ouster as to ditch property.

Respectfully submitted,

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